

ADVISORY OPINION NO. 2005-13

Issued On August 4, 2005 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A County Prosecuting Attorney asks whether he can be employed to perform additional legal work under a grant awarded to the county.

FACTS RELIED UPON BY THE COMMISSION

The requester is a part-time Prosecuting Attorney in a small, rural county. His compensation as the elected Prosecuting Attorney is established under W. Va. Code § 7-7-4. For several years, a part-time Assistant Prosecuting Attorney has been employed to provide legal services related to the prevention and prosecution of domestic violence. This program is funded through a federal grant that provides \$9000 annually.

It has become increasingly difficult to find an attorney willing to take on this additional responsibility. Therefore, the grant authority and County Commission have agreed to increase the Prosecuting Attorney's pay by the amount of the grant, in exchange for his agreement to perform these additional duties, provided it is otherwise legal.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(d)(1) *Interests in public contracts*, provides in part that ... no elected or appointed official or employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in ... a contract which such official or employee may have direct authority to enter into, or over which he or she may have control: Provided, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body.

W. Va. Code § 61-10-15 states in part that ... It shall be unlawful for any ... county or district officer ... to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract ... [over] which as such ... officer ... he may have any voice, influence or control ...

ADVISORY OPINION

Both the Ethics Act and W. Va. Code § 61-10-15, a criminal misdemeanor statute, prohibit public servants from being a party to, or having a financial interest in, a public contract, purchase or sale over which their public position gives them control. However, the Ethics Act prohibition does not apply to "the employment of any person with any governmental body." Therefore, it would not be a violation of the Ethics Act's prohibition against having a private interest in a public contract for

the County Commission to employ a part-time Prosecuting Attorney to perform additional work under a federal grant.

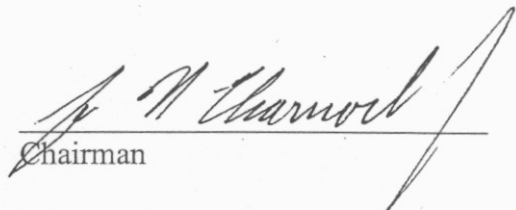
W. Va. Code § 61-10-15 applies a stricter standard and extends its prohibition to those contracts over which certain public servants, including the Prosecuting Attorney, “may have voice, influence or control.” The Commission has ruled previously, in Advisory Opinion 99-07, that a Prosecutor’s statutory responsibilities as counsel for the County Commission vest in him the required degree of “voice, influence or control” over County Commission contracts. Moreover, unlike the Ethics Act, this prohibition extends to contracts of employment.

Accordingly, in Advisory Opinion 2000-31, the Commission concluded that a part-time Prosecuting Attorney could not contract to perform legal work for a regional planning and development agency which was receiving funds for that work through the County Commission, without violating W. Va. Code § 61-10-15. Therefore, a separate contract between the Prosecutor and County Commission to perform this additional work would not be permissible.

To whatever extent the County Commission has discretion to set the salary of a part-time elected Prosecuting Attorney, it would also violate § 61-10-15 to negotiate a revised salary to compensate the Prosecutor for taking on additional work previously performed by an Assistant Prosecutor. Further, the County Commission’s discretion in such matters may be limited by the terms of W. Va. Code § 7-7-4 and § 7-7-4a, relating generally to the compensation and duties of a Prosecuting Attorney.

Unlike the Ethics Act and W. Va. Code § 61-10-15, which the Legislature has explicitly authorized the Commission to interpret and apply, the Commission is without authority to render a definitive opinion as to whether providing additional compensation to a part-time Prosecuting Attorney for performing certain duties would constitute a violation of any provision in these statutes.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code §§ 6B-1-1, *et seq.*, and W. Va. Code § 61-10-15, and does not purport to interpret other laws or rules. Pursuant to W. Va. Code § 6B-2-3, any person acting in good faith reliance on an advisory opinion is immune from the sanctions of W. Va. Code § 61-10-15, and shall have an absolute defense to any criminal prosecution to actions taken in good faith reliance upon such opinion. Further, in accordance with W. Va. Code § 6B-2-3, this opinion has precedential effect and may be relied upon in good faith by public servants and other persons unless and until it is amended or revoked.


Chairman